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CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1006

DISTRICT OF COLUMBIA, *Petitioner,*

v.

THE QUEEN CITY BREWING COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
GLENN SIMMON,
Assistant Corporation Counsel, D. C.,
Attorneys for the Petitioner.
District Building.

DIVISION OF PRINTING—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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Petition

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the District of Columbia, respectfully shows and represents unto Your Honors that:

Statement of Matter Involved

Laws applicable to the District of Columbia provide that all personal property in the District subject to taxation shall be listed and assessed at its full and true value. The Assessor,

D. C., assessed taxes for the fiscal years ended June 30, 1938, 1939, 1940, and 1941, upon certain containers owned by respondent and habitually employed in the District of Columbia during such years. The respondent appealed from such assessments to the Board of Tax Appeals for the District of Columbia, which Board held respondent's property to be taxable under the District law and sustained the validity of the assessments (R. 9-34). Respondent petitioned the United States Court of Appeals for the District of Columbia for a review of the decision of the Board of Tax Appeals. On February 8, 1943, the Court of Appeals reversed the decision of the Board of Tax Appeals and held that there is no statute applicable to the District of Columbia under which migratory personal property of a nonresident, habitually employed in the District of Columbia, may be taxed (R. 75-80).

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 8, 1943. The jurisdiction of this Court to issue the writ applied for is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether tangible personal property of a nonresident, habitually employed in the District of Columbia, is taxable under Acts of Congress requiring all personal property in the District of Columbia subject to taxation to be listed and assessed.

Reasons Relied on for the Allowance of the Writ

1. The United States Court of Appeals for the District of Columbia in this case has decided a question of general import-

ance which has not been, but should be, settled by this Court.

This case presents the question of whether statutes applicable to the District of Columbia impose taxes upon nonresident owners of tangible personal property habitually employed in the District of Columbia. Among the numerous classes of property affected by the decision are rolling stock of railroads, tank, refrigerator, and sleeping cars, various types of containers, machinery and equipment of contractors and others which is used both within and without the District during the tax year. The question here presented is of importance to the owners of all such classes of property, as well as the District of Columbia.

2. The Court of Appeals has not given proper effect to the decision of this Court in the case of *Johnson Oil Company* v. *Oklahoma*, 290 U. S. 158.

WHEREFORE, Your petitioner prays the allowance of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia in this cause, and entitled *The Queen City Brewing Company, Petitioner* v. *District of Columbia, Respondent*, No. 8303, that said cause may be reviewed and determined by this Court, and that the judgment of the said Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

DISTRICT OF COLUMBIA,
Petitioner.

By:

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
GLENN SIMMON,
Assistant Corporation Counsel, D. C.,
Attorneys for the Petitioner,
District Building,

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

The opinion of the Board of Tax Appeals for the District of Columbia (R. 9-34) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 75-80) is not yet reported.

Jurisdiction

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition.

Statement of the Case

The respondent is a Maryland corporation engaged in the operation of a brewery at Cumberland, Maryland (R. 40). It there sold to its District of Columbia distributor or franchisee in the regular course of business beer for distribution to retailers and others in the District of Columbia (R. 44). The beer was dispensed in three types of containers, namely, wooden cases containing twenty-four glass bottles each, metal half-barrels, and metal quarter-barrels (R. 44). While the beer belonged to the distributor or franchisee, the respondent retained ownership of the containers and exacted a deposit to insure their return (R. 51-52). Retailers in the District purchasing respondent's products from the local distributor, and local consumers purchasing from retailers were likewise required to make deposits to insure the return of the containers. These containers remain in the District until the contents have been used and they have found their way back to the local distri-

butor, who returns them to the brewery to be refilled and brought back into the District or sent wherever respondent's products are sold. Daily or in the regular course of business the distributor or franchisee brought the containers filled with beer into the District and returned them to Cumberland when empty, so that at all times there were actually in the District a number of containers belonging to the petitioner. On the tax days of the taxable years here involved, containers belonging to the petitioner were physically present in the District of Columbia as follows (R. 15):

Tax day	Taxable year ending	½ barrels	¼ barrels	Wood Cases, 24 bottles
July 1, 1937	June 30, 1938	402	113	14,690
July 1, 1938	June 30, 1939	311	130	7,214
July 1, 1939	June 30, 1940	218	112	10,366
July 1, 1940	June 30, 1941	614	289	8,910

The Board of Tax Appeals found as a fact that the number of containers in the District on the tax dates involved represented a fair daily average of the number actually in the District during each of the taxable years (R. 15).

The Board of Tax Appeals held that the number of containers in the District on the tax dates involved had a taxable situs in the District of Columbia and were properly taxable under the District statutes (R. 9-34). The Court of Appeals reversed the decision of the Board of Tax Appeals and held that migratory personal property of a nonresident could not be taxed under a general statute such as that applicable to the District of Columbia (R. 75-80).

Specification of Errors

The United States Court of Appeals for the District of Columbia erred:

In holding that the respondent is not taxable under laws applicable to the District of Columbia upon the full and true value of its containers habitually employed in the District of Columbia.

Statutes Involved

Paragraph 2 of Section 6 of the Act of July 1, 1902 (32 Stat. 618; Section 47-1207, D. C. Code, 1940), provides as follows:

> "On all tangible personal property, assessed at a fair cash value (over and above the exemption provided in this section), including vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons, and other vehicles, there shall be paid to the collector of taxes of the District of Columbia one and one-half per centum on the assessed value thereof."

On June 29, 1922, the following provisions were enacted into law (42 Stat. 669; Section 47-501, D. C. Code, 1940:

> "For the purpose of defraying such expenses of the District of Columbia as Congress may from time to time appropriate for, there hereby is levied for each and every fiscal year, a tax at such rate on the real and personal property subject to taxation in the District as will, when added to the other taxes and revenues of the District, produce money enough to enable the District to pay promptly and in full all sums directed by Congress to be paid by the District, and for which appropriation has been duly made; * * *."

And, in the Act of July 3, 1926 (44 Stat. 833; Section 47-1202, D. C. Code, 1940), it is provided that:

> "All personal property in the District Columbia subject to taxation shall be listed and assessed at not less than the full and true value thereof in lawful money."

Summary of Argument

The statutes levy a tax upon all tangible personal property having a taxable situs in the District of Columbia, and require the filing of returns by the owners of such property. In the case of Johnson Oil Company v. Oklahoma, 290 U. S. 158, this Court construed a general statute of the State of Oklahoma as taxing the personal property of a nonresident habitually employed within that State. The provisions of the District statutes here involved are substantially the same as the provisions of the Oklahoma statute involved in the Johnson Oil Company case. Respondent's personal property here involved was habitually employed in the District of Columbia during the tax years in question, and is properly taxable under this Court's decision in the Johnson Oil Company case.

ARGUMENT

I

Respondent was required to file returns of its personal property having a taxable situs in the District of Columbia.

In its brief and argument before the Court of Appeals, respondent contended that it was not required to file returns of its tangible personal property habitually employed in the District of Columbia. The question of the liability of the respondent to file returns was not presented to the Board of Tax Appeals. It therefore was not properly before the Court of Appeals and was not ruled upon by such Court. However, the applicable statutory provisions relating to the filing of returns are set forth herein for the convenience of the Court in considering what effect, if any, they may have upon the question of liability to the tax.

Section 6, paragraph 1, of the Act of July 1, 1902 (32 Stat. 617; Section 47-1203, D. C. Code, 1940), provides that the Assessor of the District of Columbia shall annually cause to be prepared a printed blank schedule of all tangible personal

property and all general merchandise or stock in trade, owned or held in trust or otherwise subject to taxation; that when such schedule is ready for delivery, notice thereof shall be given by the Assessor by advertisement in one or more of the daily newspapers published in the District, and a copy of said schedule shall be delivered to anyone applying therefor at the office of the Assessor; that "Every person, association, corporation, firm, or company in said District liable to taxation hereunder, and every association, company, executor, administrator, guardian, or trustee holding personal property in trust liable to taxation hereunder, shall, within 30 days after the last publication of said advertisement, as aforesaid, fill out the proper blanks in said schedule with a full and true statement, as in this section hereinbefore required, and make and sign an affidavit to the truth thereof".

Section 6 of the Act of July 1, 1902, *supra*, was amended by the Act of July 3, 1926 (44 Stat. 833), as follows:

> "That the returns of all personal property provided for in section 6 of the said Act of July 1, 1902, shall be made during the month of March in the fiscal year preceding the one under which the assessment is to be levied, and, except as otherwise provided by law, the value of the tangible and intangible property shall be taken as of January 1 for a basis of assessment for the next fiscal year."

The said Section 6 was further amended by the Act of February 18, 1929 (45 Stat. 1227 Section 47-1206, D. C. Code, 1940), as follows:

> "That beginning July 1, 1930, returns of all personal property other than automobiles shall be made in the month of July in the fiscal year in which the assessment is levied and the value of such property shall be made as of the first day of that month except that merchants shall continue to return their average stock in trade as provided in said act of 1902: *Pro-*

vided, That this section shall be effective during March, 1929."

It will be noted that the amendment of July 3, 1926, referred to returns of personal property *provided for in Section 6 of the Act of July 1, 1902,* while the amendment of February 18, 1929, referred to returns of *all personal property* other than automobiles. The language of the 1929 amendment is all-inclusive, and requires returns of all tangible personal property subject to taxation in the District of Columbia.

II

The property here involved had a taxable situs in the District of Columbia and is taxable under the District statutes.

The Court of Appeals held that migratory personal property owned by a nonresident, and habitually employed in the District of Columbia, is not taxable under the District statutes. It is the view of the petitioner that the provisons of the applicable District statutes are substantially the same as the provisions of the Oklahoma statute which this Court, in the case of *Johnson Oil Company* v. *Oklahoma,*[1] construed as taxing migratory personal property owned by a nonresident of Oklahoma but habitually employed in that State. The Oklahoma statute involved in the *Johnson Oil Company* case provides as follows:

> "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation." [Sec. 1, Chapter 44, Session Laws, 1915, page 64 (Sec. 9574, C. O. S. 1921).]

The Court of Appeals has misconstrued this Court's decision in the *Johnson Oil Company* case in at least three respects: (a) in holding that the conclusion which this Court reached

[1] 290 U. S. 158.

therein was not based on any particular Oklahoma statute; (b) in holding that this Court did not consider the question of statutory construction; and (c) in holding that the Supreme Court of Oklahoma, upon remand of the case, disposed of it under another section of the Oklahoma statute (9640 C. O. S. 1921).

(a)

In taking the view that this Court, in holding the Johnson Oil Company taxable on the basis of the average number of its cars habitually employed within the State of Oklahoma, gave no consideration to any particular statute, the Court of Appeals states (R. 79):

> "But it is a mistake to say that the Supreme Court reached this conclusion on the basis of any particular Oklahoma statute. A careful reading of the opinion shows that the Court was concerned only with stating the broad, general principle that 'when individual items of rolling stock are not continuously the same but are contantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits.' "

That the *Johnson Oil Company* case was decided under the general provisions of Section 9574, C. O. S. 1921, seems free from doubt. The Supreme Court of Oklahoma quotes the section in its opinion (19 P. (2d) 169), and refers to no other provision of the Oklahoma statutes. The records and briefs before this Court in the *Johnson Oil Company* case clearly disclose that the general provisions of Section 9574 were the only statutory provisions involved in the case[2]. Furthermore, the same objection to the statute which was made by the respond-

[2] Transcripts of Record, pages 71, 72; Statements of Jurisdiction, pages 2 and 3; Statements Opposing Jurisdiction, page 2; Brief for Appellant, page 3; Brief for Appellee, page 23.

ent here and sustained by the Court of Appeals was made by the Johnson Oil Company [3] and denied by this Court. The respondent, in the Court of Appeals in this case, relied upon the same cases as the appellant in the *Johnson Oil Company* case.[4]

(b)

With respect to the question of statutory construction, the Court of Appeals states (R. 80):

> "But from the beginning to the end of the opinion of the Supreme Court of the United States there is nothing to even suggest that the Court considered the question of statutory interpretation."

It seems plain that this Court did construe the Oklahoma statute in the *Johnson Oil Company* case. The Supreme Court of Oklahoma, in its original opinion [5] construed the statute as taxing all the cars of the Johnson Oil Company, and expressly held (19 P. (2d) 170) that

> "There is no law authorizing a tax based upon an 'average number' of cars present on a given day at any one taxable point, * * *."

This Court held that the basis of the jurisdiction is the habitual employment of the property within the State, and that Oklahoma was entitled to tax the number of cars which, on the average, were found within the State. The judgments of the Supreme Court of Oklahoma were reversed and the cases remanded for further proceedings not inconsistent with this Court's opinion. When the cases were considered by the Supreme Court of Oklahoma after remand,[6] the Johnson Oil Company made motions to have them remanded to the trial

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[3] Part 3, beginning on page 24, Brief for Appellant;
[4] *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117; *Tamble* v. *Pullman Co.*, 207 F. 30.
[5] 162 Okla. 183, 19 P. (2d) 168.
[6] 167 Okla. 452, 30 P. (2d) 692.

courts with directions to set aside the judgments there rendered and render judgments in favor of the Johnson Oil Company. In support of such motions it was argued that the Supreme Court of Oklahoma had held that there was no law in Oklahoma authorizing a tax based upon the average number of cars present on a given day at any one taxable point. The Court agreed that it had so held but pointed out that its holding had been reversed by this Court, and held that under this Court's decision the Johnson Oil Company was taxable on the basis of the number of cars which on the average were physically present within the State.

(c)

The opinion of the Court of Appeals points out that at the time of this Court's decision in the *Johnson Oil Company* case there were in existence two statutes in Oklahoma, one taxing all property, real and personal[7], and the other taxing the property of sleeping car companies, freight car companies, car corporations, or companies engaged in business in the State.[8] The opinion then states (R. 80) that

[7] Sec. 9574, C. O. S. 1921, quoted on page 10 of this brief.
[8] Sec. 9640, C. O. S. 1921, provides as follows:

> "Every sleeping-car company, freight car company, car corporation, or company engaged in business in this state, shall file with the Auditor a statement under oath, showing the aggregate number of miles made by cars operated by such company over the several lines of railroad in this State during the fiscal year next preceding the date of such statement; the total number of cars owned by such company and the total value thereof, and the average number of miles traveled by cars of the particular class covered by the statement in the ordinary course of business during the fiscal year, and it shall be the duty of the state board of equalization to ascertain the number of cars required to make the total mileage of cars of such corporation within the period of one year. Said board shall ascertain and fix a valuation upon each particular class of said cars, and the number so ascertained to be required to make the total mileage of the cars of such corporation, within the period of one year, shall be assessed to the respective corporations, and such assessment shall be included in the record of the proceedings of the board and shall be certified by the state auditor to the county clerks of the several counties of the State wherein such cars are operated in the same manner as the property of other public service corporations is certified and returned."

> "After the remand by the Supreme Court the case was disposed of in the Supreme Court of the State (30 P. (2d) 692) on the basis of the average number of cars present on a given day at any one taxable point, *doubtless responsive to the latter section.*" (Emphasis supplied.)

It is apparent that the conclusion stated by the Court of Appeals was reached without reading the opinion of the Supreme Court of Oklahoma, which latter opinion states (30 P. (2d) 693):

> "That the cars in question are personal property, and that such of them as are taxable in Oklahoma are taxable as such under the provisions of section 9574, C. O. S. 1921, is beyond question."

Section 9640[9] is a part of Article V, Chapter 84, C. O. S. 1921, all of which Article deals exclusively with assessment of public service corporations. Obviously, the Johnson Oil Company is not a public service corporation. Throughout the entire history of the litigation there is no suggestion by the taxing authorities of Oklahoma or anyone else that the Johnson Oil Company could possibly be taxable under the provisions of Section 9640. Furthermore, the method of taxation prescribed in Section 9640 is different from that employed in taxing the cars of the Johnson Oil Company. Under Section 9640, the number of cars to be taxed is determined by the mileage traveled in Oklahoma during the tax year divided by the average number of miles traveled by all cars of the same class owned by such public service corporation. In other words, the tax imposed by Section 9640 is determined on the basis of mileage traveled in Oklahoma as compared to total mileage traveled by the cars of a public service corporation, whereas the tax in the *Johnson Oil Company* case was determined on the basis of the average number of cars habitually employed within the

[9] Quoted in full in Note 8, page 13 hereof.

State without regard to mileage traveled by such cars either within or without the State.

CONCLUSION

It is respectfully submitted that this case is one of general importance which should be decided by this Court; that the Court of Appeals has not given proper effect to the decision of this Court in the case of *Johnson Oil Company* v. *Oklahoma*, *supra*, and that a writ of certiorari should be granted, and this Court should review the decision of the United States Court of Appeals for the District of Columbia, and finally reverse said decision.

RICHMOND B. KEECH,
Corporation Counsel, D. C.,

VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,

GLENN SIMMON,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner.

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BRIEF IN OPPOSITION.

E. BARRETT PRETTYMAN
F. G. AWALT
RAYMOND SPARKS
W. V. T. JUSTIS
822 Connecticut Avenue
Washington, D. C.
Attorneys for Respondent.

HEWES PRETTYMAN AND AWALT
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS

CASES:

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BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 75-80) is reported at 134 F. (2) 44. The findings of fact and opinion of the Board of Tax Appeals for the District of Columbia (R. 9-34) are not reported.

JURISDICTION.

The decree of the Court of Appeals (R. 81) was entered on February 8, 1943. The petition for a writ of certiorari was filed in this Court on May 6, 1943. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and on 28 U. S. C. (1940) § 350. See also D. C. Code (1940) § 47-2404(a).

QUESTION PRESENTED.

Whether, as a matter of statutory construction, the Acts of Congress imposing taxes on personal property in the District of Columbia, tax the migratory personal property of a foreign corporation introduced into, and removed from, the District by an independent wholesaler in the course of his business, when the foreign corporation is not doing business in the District.

STATUTES INVOLVED.

The pertinent statutory provisions are set forth in the Appendix (see *infra*, p. 11 *et seq.*).

STATEMENT.

1. ASSESSMENT.—On or about September 20, 1941, the Assessor of the District of Columbia assessed respondent on the value of the average number of its beer containers present in the District during the fiscal years 1938, 1939, 1940, and 1941 (R. 7, 15-16). The Assessor took, as the average number of respondent's containers present in the District during the years in question, the number actually present on the tax days of those years (R. 15). Respondent paid the taxes under protest (R. 8-9) and prosecuted a petition for cancellation and refund to the Board of Tax Appeals for the District of Columbia (R. 2-8).

2. BOARD'S AFFIRMANCE OF ASSESSMENT.—By a decision entered on May 6, 1942, the Board held that respondent's containers had been properly assessed and that respondent was not entitled to a refund (R. 35).

The findings of fact and opinion of the Board (R. 9-34) leading to its decision may be summarized thus:

Facts. Respondent is a Maryland corporation engaged in the manufacture and sale of beer at Cumberland, Maryland (R. 10, 19). During the fiscal years involved, it had no office, plant, warehouse, or other place of business in the

District; nor during that period did it operate vehicles in the District. No officers, directors, or employees of respondent have ever lived in the District, and none of respondent's corporate meetings were held there. Respondent has not paid any person in the District a salary, bonus, or commission. (R. 10.)

During the years in question, respondent sold beer at Cumberland, Maryland, to one Smith, who distributed the beer to retailers and others in the District (R. 10-14, 19). The beer was delivered to the trucks of Smith at Cumberland in three kinds of containers: ½ barrels, ¼ barrels, and wooden cases holding twenty-four bottles (R. 12, 14-15, 19). Upon the delivery of the beer at Cumberland, Smith was required to deposit with respondent $6.00 for each ½ barrel, $4.00 for each ¼ barrel, and 75 cents for each wooden case (R. 14-15). The containers were then brought into the District on Smith's trucks (R. 15), and, after being emptied, were returned on his trucks to respondent's place of business at Cumberland (R. 15, 19-20).[1]

Respondent made returns to the State of Maryland on all of its containers for the years 1938, 1939, 1940, and 1941, and that State assessed respondent on them for the years 1939, 1940, and 1941 (R. 18).

Opinion. The Board held that respondent was not doing business in the District during the years in question and stated that the liability of respondent must "be considered in the light of such holding" (R. 19). It then construed D. C. Code (1940) § 47-501 (see *infra*, p. 12) as imposing a tax on all personal property in the District which could be constitutionally taxed (R. 20-23), and held that the respondent's containers could be thus taxed (R. 23-31). It reasoned that the containers could be taxed because they were habitually employed in the District of Columbia by the respondent in the sense that, though brought into the District

[1] Respondent conceded, and petitioner admitted, that the containers at all times remained the property of respondent (R. 15).

by the wholesaler in the course of his business, they were habitually present in the District in the advancement of respondent's business since, had the respondent not furnished the containers, the moving cause of its sales of beer to the wholesaler at Cumberland, Maryland (i. e., the resale of the beer in the District by the wholesaler), would not have been brought into operation (*idem*).

In reaching its decision that respondent's containers could be validly taxed, the Board relied on the "habitual employment" doctrine stated in *Johnson Oil Refining Company* v. *Oklahoma*, 290 U. S. 158. The Board, however, relied on this case only for the proposition that a taxing authority can constitutionally tax all personal property habitually employed within its borders, and for that proposition alone. It did not interpret that case as holding that a statute which imposes a tax on personal property generally, and which does not use language aptly indicating an intent to tax migratory personal property, should be construed as having an incidence on the latter kind of property (R. 26-30).

3. Reversal of Board by Court of Appeals.—On a petition to review (R. 36-39), the Court of Appeals, by a decree entered on February 8, 1943 (R. 81), reversed the decision of the Board of Tax Appeals. The Court limited its decision to one question: "whether tangible personal property temporarily in the District, belonging to a non-resident not engaged in business in the District, is intended to be and is taxed" under the applicable statutes in force in the District (R. 76). The Court expressly declined to rule on the question whether respondent's containers, under the facts of the case, would be taxable under "appropriate legislation" (R. 80). It concluded that "the statutes [i. e., D. C. Code (1940) §§ 47-1203, 47-1206, 47-1207, 47-501; see *infra*, p. 11, *et seq.*] relied upon [by petitioner] apply only to property that has acquired a fixed definite and permanent taxable situs" in the District (R. 80).

The Court rested its decision principally upon the doctrine of *Marye* v. *B. & O. R. R. Co.*, 127 U. S. 117; i. e., upon the doctrine that a statute imposing a tax on personal property will not be construed as having an incidence on migratory personal property of a foreign owner unless it contains language aptly indicating an intent that such property should be taxed (R. 77-79). In reaching its decision, the Court overruled petitioner's contention that this Court in *Johnson Oil Refining Company* v. *Oklahoma*, *supra*, construed a general tax statute of Oklahoma[1] as imposing a tax on the migratory personal property of a foreign owner (R. 79-80).

ARGUMENT.

1. Petitioner contends (Pet. 7, 8, 10-15) that the Court of Appeals erred in holding that the applicable tax statutes of the District of Columbia (see *infra*, p. 11 *et seq.*) do not assign to respondent's containers a tax situs in the District. Its argument in support of this contention is twofold: *first*, that this Court in the *Johnson Oil Company* case, *supra*, construed a tax statute[1] as having an incidence upon the migratory personal property of a foreign owner even though that statute did not, any more than do the District statutes, contain express provisions for the taxation of such property (Pet. 10); *second*, that this Court in the same case overruled a contention, made under the *Marye* case, *supra*, that such a statute should not be construed as applying to the migratory property of foreign owners (Pet. 11-12). Respondent submits that these arguments are without merit.

First. The only question considered by this Court in its opinion in the *Johnson Oil Company* case was whether, in view of the due process clause of the Fourteenth Amend-

[1] Sec. 9574, C. O. S. 1921, which provided: "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

ment, the State of Oklahoma could tax the entire fleet of 380 cars used by the Company, a foreign corporation, in the course of its interstate shipment of oil from its refinery in Pawnee County, Oklahoma.[1] That question arose on an appeal from a decision of the Supreme Court of Oklahoma holding that the entire fleet had a "taxable situs" in Oklahoma (290 U. S. 159) and therefore were subject to the tax imposed on personal property by Sec. 9574, C. O. S. 1921.[2] *In re Johnson Oil Refining Co.,* 162 Okl. 185, 186. Before considering the question, this Court clearly stated the basis upon which its determination was to be made:

> "As the asserted federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence." (290 U. S. 159-160)

The Court then proceeded to summarize the undisputed evidence, which showed that the average number of the Company's cars habitually present in Oklahoma was far less than the number of cars comprising its entire fleet (290 U. S. 160-161). It next stated the law with respect to the power of a state to tax constitutionally the rolling stock of a foreign corporation (290 U. S. 161-162). On that point it concluded that "the basis of jurisdiction is the habitual employment of property within the state" and that "when . . . individual items of rolling stock . . . are constantly changing . . . the state may fix the tax by reference to the average number of cars . . . habitually within its limits" (290 U. S. 162). Applying the law stated to the

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[1] "These cases present the question of the validity of property taxes laid in Pawnee County, Oklahoma, under the state statute, upon the entire fleet of appellant's tank cars. The challenge in each case was under the due process clause of the Fourteenth Amendment of the Federal Constitution upon the ground that the cars did not have their situs within the State and hence that the State had no jurisdiction to tax them." (290 U. S. 159)

[2] See *supra,* p. 5, n. 1.

facts summarized, the Court, reversing the Supreme Court of Oklahoma, held that Oklahoma could not constitutionally tax the entire Company's entire fleet of cars, but stated that it could tax "the number of cars which on the average were found to be physically present within the state" (290 U. S. 163).

It is thus plain that the decision in the *Johnson Oil Company* case did not turn on a construction of the Oklahoma statute under which the Company had been taxed. This Court accepted the fact that the Company's entire fleet had been taxed under a "state statute" and then immediately proceeded to determine, and to determine only, the question whether Oklahoma could, in view of the facts in the case, constitutionally tax the entire fleet. Never once did it refer to the terms of the Oklahoma statute or in any way suggest that its determination was dependent upon the terms of that statute. The Court's statement that Oklahoma could validly tax "the number of cars which on the average were found to be physically present in" Oklahoma was a statement that a certain portion of the Company's fleet could, under the facts of the case, be properly taxed. It was not a construction of the incidence of the Oklahoma statute. Nor could it have been; for the Supreme Court of Oklahoma had, in that very case, construed the statute in question as not "authorizing a tax based upon an 'average number' of cars present on a given day at any one taxable point,"[1] and that construction was binding on this Court. *Minnesota* v. *Probate Court,* 309 U. S. 270, 273.

Second. There are several considerations which may be relied upon to demonstrate that this Court in the *Johnson Oil Company* case did not overrule a contention that a tax statute should not, under the *Marye* case, be construed as having application to the migratory property of a foreign owner unless it contains provisions showing that such property was intended to be taxed.

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[1] *In re Johnson Oil Refining Company, supra,* 186.

In the first place, as shown above, the decision in the *Johnson Oil Company* case did not turn on a question of statutory construction but on the sole question whether, when the facts of record were considered in the light of the applicable principles of constitutional law, the State of Oklahoma had the power to tax the Company's entire fleet of cars. In the second place, this Court in the *Johnson Oil Company* case relied (290 U. S. 161, 162) on the first holding of the *Marye* case, i. e., that a state can constitutionally tax a foreign owner's migratory property habitually employed within its borders (127 U. S. 123-124), but failed to refer to the second holding of that case, i. e., the holding on the question of statutory construction (127 U. S. 124-125). It is beyond belief that this Court in the *Johnson Oil Company* case relied on the first holding of the *Marye* case in reaching its determination of the one question which it considered and then, *sub silentio*, overruled the second holding of the *Marye* case even though that holding was not germane to the question determined in the *Johnson Oil Company* case. Finally, the rule of construction stated by this Court in the *Marye* case, which arose on an appeal from a judgment entered by a lower federal court in a diversity of citizenship suit, was not predicated on a federal right and, therefore, could not properly have been raised before, or considered by this Court in the *Johnson Oil Company* case since that case arose on an appeal from a judgment of a state court.

2. Petitioner states (Pet. 2-3) that this Court should allow a writ in this case because the Court of Appeals "has decided a question of general importance which has not, but should be, settled by this Court." This statement is susceptible of two interpretations and two answers.

First. Petitioner's statement may mean that the Court of Appeals in deciding to construe the District statutes consonantly with the rule of construction used by this Court in the *Marye* case has decided a legal question of large

importance with respect to the proper construction of tax statutes. If this is the meaning, the statement carries its own answer. The Court of Appeals followed a decision of this Court that was directly in point, and, therefore, it can hardly be said that the question raised is one which has not been determined by this Court. Another answer to the statement, as thus interpreted, is that the question whether the rule of the *Marye* case should be used in the construction of tax statutes is not one of general importance; for it is neither a question which can be raised in federal courts under state statutes, except in diversity of citizenship cases (and then only in the unlikely event that there is not an outstanding construction by a state court), nor a question which is likely to arise under federal statutes other than those applicable to the District of Columbia.

Second. Petitioner's statement may be taken to mean that the decision of the Court of Appeals is of general importance because it put beyond petitioner's reach a source of tax revenue to which it asserted a right. We submit, however, that viewed in this light the question decided by the Court of Appeals is one of local or municipal importance and not one of the general or federal importance necessary to call into operation the discretionary power of supervision which this Court exercises over the decisions of the Court of Appeals. In this connection, it would seem to respondent that, decision having been rendered by the Court of Appeals (the court of last resort in the District) in a manner not raising any matter of importance, the question should no longer be whether the statutes of the District of Columbia do tax a foreign owner's migratory property brought into the District by another in the course of his business, but whether such property, as a matter of fiscal policy, should be taxed. And respondent thinks that this question is an appropriate one for the Congress to determine.

CONCLUSION.

This case presents a question of local importance only. The Court of Appeals decided that question in conformance with the applicable decision of this Court. Respondent respectfully submits, therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

E. Barrett Prettyman
F. G. Awalt
Raymond Sparks
W. V. T. Justis
822 Connecticut Avenue
Washington, D. C.
Attorneys for Respondent.

Hewes Prettyman and Awalt
Of Counsel.

APPENDIX.

The pertinent provisions of D. C. Code (1940) §§ 47-1203, 47-1206, 47-1207, 47-501, read as follows:

§ 47-1203.—The assessor of the District of Columbia * * * shall annually cause to be prepared a printed blank schedule of all tangible personal property and all general merchandise or stock in trade owned or held in trust or otherwise, subject to taxation * * *. When said schedule is ready for delivery, notice thereof shall be given by the assessor by advertisement * * * in * * * newspapers published in said District, and a copy of said schedule shall be delivered to any citizen applying therefor * * *. Every person, association, corporation, firm, or company, in said District liable to taxation hereunder * * * shall, within thirty days after the last publication of said advertisement, fill out the property blanks in said schedule with a full and true statement * * * and make and sign an affidavit to the truth thereof * * * and the address in the District of Columbia of the person, corporation, or company making affidavit shall in each case be given below his, its or their signature, and thereupon said board of personal tax appraisers, or any one of the members thereof, shall assess said property at its fair cash value * * * and the amount thus ascertained shall be entered upon the books for taxation for each fiscal year * * *. (Section 6, par. 1, Act of July 1, 1902, 32 Stat. 617.)

§ 47-1206.—That beginning July 1, 1930, returns of all personal property other than automobiles shall be made in the month of July in the fiscal year in which the assessment is levied and the value of such property shall be made as of the first day of that month except that merchants shall continue to return their average stock in trade as provided in said act of 1902: Provided, That this section shall be effective during March, 1929. (Act of February 18, 1929, 45 Stat. 1227.)

§ 47-1207.—On all tangible personal property, assessed at a fair cash value (over and above the exemptions provided in this section) including vessels, ships, boats, tools, implements, horses, and other animals, wagons, and other vehicles, there shall be paid to the

collector of taxes of the District of Columbia one and one-half per centum on the assessed value thereof. (Section 6, par. 2, Act of July 1, 1902, 32 Stat. 618.)

§ 47-501.—For the purpose of defraying such expenses of the District of Columbia as Congress may from time to time appropriate for, there is hereby levied for each and every fiscal year, a tax at such rate on the real and personal property subject to taxation in the District as will, when added to the other taxes and revenues of the District, produce money enough to enable the District to pay promptly and in full all sums directed by Congress to be paid by the District, and for which appropriation has been duly made; * * *. (Act of June 29, 1922, 42 Stat. 669.)